OAH 58-3100-22324-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

David H. Hart, Petitioner

v.

Minnesota Iron Range Resources and Rehabilitation Board, Respondent

And

Mark L. Pommier, Petitioner

v.

Minnesota Iron Range Resources and Rehabilitation Board, Respondent

And

Richard B. Walsh, Petitioner

v.

Minnesota Iron Range Resources and Rehabilitation Board, Respondent

RECOMMENDATION ON THE SUMMARY DISPOSITION MOTION OF THE MINNESOTA IRON RANGE RESOURCES AND REHABILITATION BOARD

This case arises out of the State shutdown, which began on July 1, 2011. As of that date, most State employees were laid off. The shutdown occurred because the State had not approved an operating budget for the biennium commencing July 1, 2011. The budget issue was subsequently resolved, and State employees, including the Petitioners, returned to work on July 21, 2011, once funding was approved.

The Petitioners are employees of the Minnesota Iron Range Resources and Rehabilitation Board (the Board) who were laid off during the shutdown. The Petitioners each filed a Petition for Relief under the Minnesota Veterans Preference Act (VPA) regarding their layoffs. The Petitioners contend that the layoffs resulted from the State's lack of good faith in failing to enact a biennial budget. They also maintain that, because the Board has its own funding source, they should not have been laid off.

A prehearing conference was held on October 11, 2011 at the Office of Administrative Hearings. David H. Hart, Mark L. Pommier, and Richard B. Walsh (Petitioners) appeared on their own behalves. Marianne Bouska, Human Resources Director for the Board appeared on its behalf. Subsequently, Assistant Attorney General Kristyn Anderson filed a Notice of Appearance as attorney for the Board.

By an Order dated October 12, 2011, the ALJ consolidated the Petitioners' individual cases and ordered the Parties to file written submissions regarding the case. The Petitioners filed a joint argument with exhibits. The Board thereafter moved to dismiss the Petitioners' claims. Because the Board's dismissal motion was accompanied by an affidavit and exhibits, the ALJ has treated the motion as one for summary disposition.

Based on the filings and records herein, and the arguments of the Parties,

IT IS HEREBY RECOMMENDED THAT:

1. The Department of Veteran Affairs **GRANT** the Board's motion for dismissal**.**

2. The Department of Veteran Affairs **DENY** the Petitioners' requests for relief under VPA.

Dated: December 9, 2011

s/Linda F. Close

LINDA F. CLOSE
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of Veterans Affairs, Veterans Service Building, Minnesota Department of Veterans Affairs, 20 West 12th Street, Second Floor, St. Paul, Minnesota 55155-2006, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Issues Presented

The Petitioners have requested relief under the VPA. They assert that the State's failure to enact funding for the biennium, resulting in the shutdown, was not done in good faith. They further contend that, because the Board is financed through a special funding mechanism, they should not have been laid off.

Summary Disposition Standard

The Board moved to dismiss the Petitioners' claims. An affidavit and exhibits accompanied the Board's brief in support of its motion. It is therefore appropriate to treat the Board's motion as one for summary disposition.[1] Summary disposition is the administrative equivalent of summary judgment.[2] Summary disposition is appropriate when there is no genuine dispute as to the material facts of a contested case, and the law applied to those undisputed facts clearly favors one of the parties.[3] The moving

[1] Minn. R. Civ. P. 12.02.
[2] *See Pietsch v. Mn. Bd. of Chiropractic Examiners,* 683 N.W.2d 303, 306 (Minn. 2004).
[3] *See Sauter v. Sauter,* 70 N.W.2d 351, 353 (Minn. 1955); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

party carries the burden of proof to establish that there are no genuine issues of material fact that would preclude disposition of the case as a matter of law.[4] Further, when considering a motion for summary disposition, the tribunal must view the facts in the light most favorable to the nonmoving party.[5] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.

In order to defeat an otherwise proper motion for summary disposition, the non-moving party must show the existence of material facts that are genuinely disputed.[6] A genuine issue is one that is not either a sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case.[7]

Undisputed Facts

The Petitioners are honorably discharged veterans employed by the Board. By a memorandum dated June 10, 2011, the Petitioners received from Minnesota Management & Budget (MMB) a notice about a potential layoff in July. Funding for the coming biennium had not been approved, and a shut down was anticipated. The MMB notice informed Petitioners they would be laid off unless the Department told him he should report to work to perform critical services.[8]

On June 15, 2011, the Attorney General requested that the Ramsey County District Court issue an Order to permit funding of certain State core functions in the event of a shutdown. By a June 29, 2011, Order, the District Court ordered that only critical core government functions be funded during the shutdown. The Court attached to its order an exhibit that designated critical functions for funding during the shutdown. As to the Board, the Court approved temporary funding for services to protect State assets, provide minimum maintenance at Giants Ridge, and provide for incident command.[9]

The Petitioners' jobs were not among the critical core functions designated by the Court funding, and they were not recalled to work during the shutdown.[10] During the shutdown, only one of the Board's 51 employees worked full time. Eleven others provided services on a limited-time basis, working from one to eight hours per week. A twelfth employee, the Giants Ridge physical plant supervisor, was authorized to work up

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[4] *See Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[5] *See Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn. 1993); *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. App. 1984).
[6] *See Murphy v. Country House, Inc.,* 240 N.W. 2d 507, 511-12 (Minn. 1976); *Borom v. City of St. Paul,* 184 N.W.2d 595, 597 (Minn. 1971).
[7] *See, e.g., O'Malley v. Ulland Bros.,* 549 N.W.2d 889, 892 (Minn. 1996).
[8] Petitioners' Ex. a1.
[9] *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota,* 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011) at Petitioner's Appendix 141.
[10] Affidavit of Marianne Bouska ¶ 6.

to 20 hours per week.[11] After the shutdown, the Petitioners and all other Board employees returned to work.[12]

The Veterans Preference Act

Disposition of this matter necessarily begins with the VPA. Minn. Stat. § 197.46 provides:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be **removed** from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.[13]

The protections of the VPA have existed in Minnesota since 1907.[14] The VPA was inspired by the Legislature's conviction that veterans have earned preference in public employment by virtue of their having served this country in times of peril.[15] Over the years, the Supreme Court has had many occasions to consider the aims and effects of the VPA. From the cases, three key principles emerge.

First, the VPA is intended to limit the grounds on which a public employer may terminate the employment of a veteran, so that arbitrary removal of a veteran cannot occur. A termination must be "for cause" [16] or, as phrased in the VPA, may occur only upon a showing either of misconduct or incompetence.[17] To these two statutory bases for termination, judicial precedent has created a third basis. A public employer may abolish a veteran's position if the action is taken in good faith.[18]

Second, notwithstanding the VPA, public employers maintain the right to control their own administrative affairs. Thus, for example, the VPA does not restrict the right of a public employer to create temporary employment positions that are not subject to the VPA.[19] Similarly, a public employer may reclassify a position as an exercise of its administrative authority, as long as the decision to reclassify is one of substance and not mere form.[20]

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[11] Bouska Affid. ¶ 7, Ex. B.
[12] Bouska Affid. ¶ 10.
[13] Minn. Stat. § 197.46 (emphasis added).
[14] *See* Act of Apr. 19, 1907, ch. 263 §§ 1, 2, 1907 Minn. Laws 355.
[15] *See Winberg v. University of Minnesota*, 499 N.W. 2d 799 (Minn. 1993).
[16] *Gorecki v. Ramsey County,* 437 N.W. 2d 646, (1989).
[17] Minn. Stat. § 197.46.
[18] *See Young v. City of Duluth*, 386 N.W. 2d 732, 738-9 (Minn. 1986).
[19] *Crnkovich v. Independent Sch. Dist. No. 701, Hibbing*, 273 Minn. 518, 141 N.W.2d 284 (1966) (seasonal employment as a carpenter is not governed by VPA); see also *McAfee v. Department of Revenue,* 514 N.W. 2d 301 (Minn. App 1994) (VPA does not apply to a temporary, unclassified attorney position).
[20] *Myers v. City of Oakdale,* 409 N.W. 2d 848 (Minn. 1987); *see also Taylor v. City of New London,* 536 N.W.2d 901 (Minn. App. 1995), rev. denied Oct. 27, 1995.

Third, an employee is not considered "removed" from employment merely because the employee experiences a work stoppage. Although the statute does not define the term "removal," the Court's decisions illuminate that term. The Court regards a demotion, for example, as a removal.[21] The same is true of placing a veteran on indefinite medical leave.[22] But a suspension is not a removal, because a suspension contemplates a return to work following the period of suspension. Suspension is thus distinguished from dismissal, in that the latter entails a complete end of employment.[23] The Court has expressly held that "a veteran is removed from his or her position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to return to the job."[24]

The Petitioners Were Not Removed From Their Positions

Applying this law to the undisputed facts of this case leaves no doubt that the Petitioners were not removed from their positions. The layoff notice received by the Petitioners explained that they were being placed on an unpaid leave of absence, unless their positions entailed "critical services." The notice explained that some employees might be recalled to perform these critical services during the shutdown. Finally, the layoff notice informed employees that their insurance coverage would continue during the shutdown, unless they elected otherwise.[25]

Based on the notice, the Petitioners must have understood that the layoff was temporary. The State, after all, continued to pay their health insurance premiums, an action that forcefully speaks to the State's intention to retain the Petitioners as employees. It was never likely or probable during this period that the Petitioners would be unable to go back to work. At the end of the shutdown, the Petitioners all returned to their jobs at the Board.[26]

Under these circumstances, the ALJ concludes that the Petitioners were not "removed" from their positions under the VPA. And removal is the trigger for relief under the VPA. Because there was no removal, there can be no relief under the VPA.

The Petitioners' Positions Were Not Abolished

The Petitioners argue the State's lack of "good faith" in shutting down its operations for a three-week period. Their assertion may stem from the MMB layoff notice, which advised the Petitioners that they had rights under the VPA and that the issue at any hearing they requested would be whether the layoff was "done in good faith and for a legitimate purpose."[27]

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[21] *Leininger v. City of Bloomington*, 299 N.W. 2d 723, 726 (Minn. 1980).
[22] *Myers*, 409 N.W.2d at 851.
[23] *Wilson v. City of Minneapolis*, 283 Minn. 352, 354, 168 N.W.2d 19, 22-23 (1969).
[24] *Myers,* 409 N.W.2d at 850-51.
[25] Petitioners' Ex. a1.
[26] Bouska Affid. ¶ 10.
[27] Petitioners' Ex. a1.

The Petitioners contend that there was no need for the State shutdown to affect Board employees because the Board's funding mechanism differs from that of other State agencies, most of which rely on the State general fund. Specifically, the Board relies on trust fund taxes, which it may expend upon approval of the Board and the Governor.[28] The Board and the Governor had both approved funding for the first quarter of fiscal year 2012 before the State shutdown.[29] The decision to lay off Board employees, notwithstanding the existence of an approved budget for the Board, demonstrates the State's lack of good faith within the meaning of the VPA, the Petitioners assert.

To the ALJ's knowledge, the Court has applied the good faith grounds for dismissal only when a public employer has abolished a veteran's position. None of the cases apply this analysis to a removal, much less a temporary layoff, especially one involving the entire State workforce. The good faith analysis comes into play when a public body eliminates an individual veteran's position as a sham, when the real purpose is to terminate the veteran's employment.

It cannot be seriously contended that the shutdown was a ruse to deprive the Petitioners of their employment. A relatively small number of State employees were recalled to perform critical services during the shutdown. Thus, veterans and non-veterans alike suffered the effects of the absence of State funding.

Apart from the "good faith" language in the VPA notice portion of the MMB layoff notice, nothing in the layoff notice suggests that the Petitioners' positions were being abolished and, indeed, the positions were not abolished. On July 21, 2011, each Petitioner was recalled to his position at the Board. Because the State did not abolish the Petitioners' positions, it must be concluded that the good faith analysis does not apply here.

The Existence of Trust Funds Is Not Dispositive in This Matter

The existence of an approved, limited-time budget for the Board is central to the Petitioners' arguments about the State's lack of good faith. The ALJ has rejected this argument because the good faith analysis applies only when a veteran's position has been abolished, as discussed above. But the ALJ also rejects the trust fund argument because it is not pertinent in a case brought under the VPA.

The Board is an executive branch agency subject to the Governor's control. Prior to the shutdown, the Governor, as the State's chief executive, assembled a task force to plan for emergency funding of State services in the event of a shutdown. The task force recommended that only critical core functions of government should be

[28] *See* Minn. Stat. *§* 298.222-.224 (Taconite Environmental Protection Trust Fund Act) and Minn. Stat. § 298.291-.298 (Douglas J. Johnson Economic Protection Trust Fund Act).
[29] Petitioners' Ex. c1.

funded during a shutdown.[30] The task force did not recommend that funding be based on the availability of special funds. It focused on critical government functions.

On June 15, 2011, the Attorney General commenced an action in the Ramsey County District Court to ensure that the critical State functions identified by the task force would be funded during the shutdown. In that action, the Governor provided the District Court with the task force's recommendations for state agency funding. The District Court adopted those recommendations, for the most part.[31]

In presenting the task force's recommendations, the Governor did not ask the court to allow funding for all of the Board's work. Nor did he request blanket funding based on the existence of the Board's trust fund monies. Instead, he asked only for temporary funding for critical services to protect State assets, provide minimum maintenance at Giants Ridge, and provide for incident command.[32] Those were the Board activities that received funding under the Court's order.

The VPA does not constrain administrative planning for an emergency like a shutdown, particularly when that planning has been ordered by a court. The Petitioners, had they been the emergency planners, may have devised a different plan than the one recommended by the Governor and ordered by the Court. But the existence of alternatives for providing State services during the shutdown does not prove a violation of the VPA. On the contrary, the existence of alternatives exemplifies the rationale for the Supreme Court's decisions allowing a public body to administer its affairs without running afoul of the VPA.[33] For these reasons, the ALJ rejects the Petitioners' argument about the availability of trust fund monies.

Conclusion

The VPA does not provide relief for the Petitioners under the circumstances of this case. During the State shutdown, the Petitioners were not removed from their positions within the meaning of the VPA, nor were their positions abolished, so as to trigger a good faith analysis under the VPA. The availability of trust funds is not an issue in this matter because the District Court authorized limited funding and expenditures for the Board and other agencies during the shutdown. For all these reasons, the ALJ recommends the Commissioner of Veteran Affairs grant the Board's motion for summary disposition.

L. F. C.

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[30] *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota,* 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011) ¶ 7.
[31] *See id.* at ¶ 28.
[32] *In re Temporary Funding of Core Functions of the Executive Branch of The State of Minnesota,* 62-CV-11-5203 (District Court, Second Judicial District, June 29, 2011) at Petitioner's Appendix 141.
[33] *See* footnotes 16-17, *supra*.